No. [redacted] 90

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In the Supreme Court of the United States

OCTOBER TERM, 1954

TALACHE MINES, INCORPORATED, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA, JOHN R. VILEY, Individually and as Former Collector of Internal Revenue for the District of Idaho, and CALVIN E. WRIGHT, Collector of Internal Revenue for the District of Idaho,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	3
Statement of the Case	5
Reasons for Granting the Writ	11
Conclusion	20

TABLE OF AUTHORITIES CITED
CASES

Page

Boehm vs. Commissioner, 326 U.S. 287, 90 L. Ed. 79 ... 11

Clipper Mining Company vs. Eli Mine and Land Company 194 U.S. 220, 48 L. Ed. 944 ... 13

Coalinga-Mohawk Oil Company vs. Commissioner, 64 Fed (2d) 262 (CA 9) ... 10, 16, 17

Colorado and Utah Coal Company vs. Commissioner, 26 BTA 588 ... 15

Dayton Co. vs. Commissioner, 90 Fed (2d) 767 (CA 8) ... 18, 19

Denman vs. Brumback, 58 Fed (2d) 128 (CA 6) ... 18

Ickes vs. Virginia-Colorado Development Corporation, 295 U.S. 639, 79 L. Ed. 1627 ... 14

Langdon-Warren Mines, Inc., vs. Reynolds, 52 Fed. Supp. 512 ... 12, 18

Mine Hill and Schuylkill Haven R. Company vs. Smith, 184 Fed. (2d) 422 (CA 3) ... 18, 19

Rhodes vs. Commissioner, 100 Fed. (2d) 966 (CA 6) ... 18, 19

Sanitary Company of America vs. Commissioner, 34 Fed. (2d) 439 (CA 3) ... 18

United States vs. Hardy, 74 Fed. (2d) 841 (CA 4) ... 17

Wheeling Tile Company vs. Commissioner, 25 Fed. (2d) 455 (CA 4) ... 17

White Dental Manufacturing Co. vs. United States, 55 Fed. Supp 117 (Ct. Cl.) ... 18

Wilbur v. Krushnic, 280 U.S. 306. 74 L. Ed. 445 ... 13

STATUTES AND REGULATIONS

Title 26 U.S.C.A. Sec. 23 (f) 2, 4, 9, 10, 11, 15, 16, 17

Title 26 U.S.C.A. Sec. 3772 10

Title 28 U.S.C.A. Sec. 1254 (1) 2

Title 30 U.S.C.A. Sec. 26 ..... 3, 13

Title 30 U.S.C.A. Sec. 28 ..... 3, 13, 14

Title 30 U.S.C.A. Sec. 28 (a) 9, 13

Income Tax Regulations 111, Sec. 29.23 (e)-3 .. 4, 11, 15, 17

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OPINIONS BELOW

The opinion of the United States District Court for the District of Idaho, Southern Division, (R. 19-20) is reported at 108 F. Supp. 25. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 100-118) is reported at 218 F. 2d 491 (Adv. Sheets).

JURISDICTION

The judgment of the Court of Appeals in this action was entered on December 28, 1954. A timely petition for rehearing was denied on March 4, 1955. The jurisdiction of this court is invoked under 28 U.S.C.A. 1254, (1).

QUESTION PRESENTED

Petitioner, a mining company, in 1942 and for many years prior thereto owned and operated, through itself or lessees, mining properties located at Talache, Bonner County, State of Idaho. In 1942 petitioner determined to abandon the mine, and thereupon, in that year, ceased all operation and maintenance of the mine, removed all its equipment therefrom, and permitted the mine to cave in. Petitioner claimed a loss resulting from this abandonment of its property for the year 1942 under 26 U.S.C.A. Sec. 23 (f). This claimed loss was disallowed in part by the United States Commissioner of Internal Revenue and a deficiency income tax for the year 1942 was assessed against petitioner in the sum of $22,773.22, which petitioner paid on May 8, 1946. This action was commenced to recover the tax paid under the deficiency assessment, together with interest from the date of payment.

The question presented is whether petitioner was entitled to deduct its loss in computing its 1942 income tax resulting from the abandonment of its mining property at Talache, Idaho, under the provisions of 26 U.S.C.A. Sec. 23 (f).

STATUTES AND REGULATIONS INVOLVED

The following are the pertinent provisions of the statutes and regulations involved in this case:

Title 30 U.S.C. Sec. 26:

Sec. 26. Locators' rights of possession and enjoyment.

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. ***

Title 30 U.S.C. Sec. 28:

Sec. 28. Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered.

*** On each claim located after the 10th day of May, 1872, and until a patent has been issued

therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May, 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. ***

Title 26 U.S.C. Sec. 23 (f.):

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * *

(f.) Losses by Corporations—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

U.S. Treasury Regulations III, Income Tax Sec. 29. 23 (e)-3 Loss of useful value—When, through some change in business conditions, the

usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 113(b) and sections 29.113 (a) (14)-1 and 29.113 (b) (1)-1 to 29.113(b) (3)-2, inclusive) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized.

STATEMENT OF THE CASE

There are no material disputes of fact in this case, and the questions involved are solely those of law.

During all of the time pertinent to this case petitioner corporation was principally engaged in the business

of mining in the State of Idaho (Complaint, para. V, R. 4; Answer, para. V, R. 17).

In 1917 petitioner purchased the mining properties involved in this action, located at Talache, Bonner County, State of Idaho, in which silver was the only mineral of any substantial value (Finding of Fact II, R. 21; R. 40-42, 48, 69). The properties consisted of both patented and unpatented mining claims (R. 42, 68). The cost of said mining properties was the sum of $258,552.84 (R. 41, 42). From the year 1917 until the mine was put into production in 1922, petitioner developed the mining properties at a total cost of $315,-452.21 (R. 47). Therefore, petitioner had an original cost basis in said mining properties in the sum of $574,-005.05.

At the time petitioner commenced mining operations in 1922, the estimated tonnage was 195,000 tons. (R. 45, 46). An immaterial dispute as to the exact tonnage was eliminated by Stipulation of the parties (Finding of Fact X, R. 23, 24; R. 70). Petitioner mined the mining properties from 1922 continuously until it ceased production through its own operations in 1926 (R. 47, 52). Thereafter, until 1942, the mine was almost continuously under lease to various parties (R. 54-60). In 1929 a lease and option to purchase the mine was given by petitioner to the Black Tail Consolidated Mining Company; it was subsequently forfeited in 1932 (R. 54, 55, 87). Also, in 1940 a lease and option to purchase the mine was given by the petitioner. However, because of the illness of the lessees' engineer and internal dis-

sension between the parties, the lease and option to purchase was forfeited by the lessees in April, 1941 (R. 59, 75). Shortly thereafter another lease was given by the petitioner on the property, which was subsequently terminated by the lessee late in 1941 (R. 59, 60).

During all of this time the mine workings and equipment were maintained and kept in repair by petitioner and the various lessees (R. 53-59, 62, 86).

During the period that petitioner was actively mining the property, it produced and sold a considerable tonnage of ore therefrom (R. 48-52). Also, the lessees from time to time mined and sold small quantities of ore (R. 58, 75). In total 111,536.94 tons of ore were removed and sold from said mining property by petitioner and its lesses up to 1942 (R. 83).

In the early part of 1942 petitioner was advised by its employee at the mine that extensive repairs to the mine workings would be required if the mine were to be maintained and kept in condition for mining purposes (R. 62, 62). Petitioner attempted in 1942 to interest other persons in leasing or purchasing the mine, but without success (R. 62, 63). The United States had entered World War II in December, 1941. Prices of materials and labor costs were rising; there was a shortage of labor; silver mines had no priorities, either as to materials or labor. In addition, the petitioner was engaged in mining operations at Atlanta, Idaho and had made very heavy commitments there in relation to those operations which were seriously taxing the resources of the petitioner (R. 63, 64; Finding of Fact V, R. 21, 22).

Faced with all of these factors in 1942 the petitioner determined that it was not economically feasible to maintain the mine and that it was valueless to the petitioner in its mining business, and that as a consequence thereof said mine would be abandoned and discarded permanently from its use in such mining business (R. 64, 65, 83).

Pursuant to this determination, in the fall of 1942, the petitioner removed from the mine the steel rails, pipe, air hose, hoist, mine locomotive and cars, mine cage, compressor and all other equipment of which use could be made (R. 64, 65, 79). Thereupon all care and maintenance of the mine ceased, and the mine was allowed to cave in (R. 66; Findings of Fact VI, R. 22). Said mine has never thereafter been used as mining property, nor has any ore been extracted therefrom, and the permanent abandonment and discard of said mine from use by petitioner in its mining business was completed in 1942 (R. 67, 69, 77; Finding of Fact VI, R. 22).

At the time of the abandonment the petitioner set up on its books the sum of $30,000.00 as the salvage value of the surface rights of this mining property for recreational purposes (R. 80, 81; Finding of Fact VI, R. 22). The property is located on the Shore of Lake Pend Oreille in a setting of great natural beauty, and ideally located as a hunting and fishing resort (R. 66, 67), and petitioner hoped that some time in the future it could dispose of the property for recreational and resort purposes, thereby salvaging a small fraction of its cost (R. 66, 81).

Following the abandonment of the mine, in the years 1943 and 194 petitioner, in order to preserve its ownership interest in the property filed notices of intention to hold the unpatented mining claims under 30 U.S.C.A. Sec. 28 (a), (R. 80), and paid the ad valorem taxes on the patented mining claims (R. 80). The reason for this action was to maintain the property intact in the effort eventually to realize the salvage value through its recreational uses. In fact the new owners of the property are using both the unpatented and patented claims and are arranging with the Federal Government to strengthen their surface interests therein (R. 67, 81).

Subsequently, in 1947, the petitioner contracted to sell the property for recreational and resort purposes, for which purposes it is now being used, for the sum of $30,000.00, being the amount of salvage value which petitioner had previously set up on its books (66, 68; Finding of Fact VIII, R. 23).

Petitioner claimed a deduction in its 1942 income tax return for its loss resulting from the abandonment of its mine, as provided in Title 26 U.S.C.A. Sec. 23 (f). The sum of $50,000.00 was allowed as a loss, but the sum of $169,773.50 was disallowed and rejected by the United States Commissioner of Internal Revenue (Complaint, para. XIII, R. 8; Answer, para. XIII, R. 18).

As a result of the disallowance of the portion of petitioner's abandonment loss, a deficiency income tax for the year 1942 was assessed against petitioner in the sum of $22,773.22, which petitioner paid to respondent,

John Viley, as Collector of Internal Revenue for the District of Idaho on May 8, 1946 (Complaint, para. XIV, R. 8; Answer, para. XIII and XIV R. 18). Petitioner duly filed a claim for refund of the deficiency tax paid in the sum of $22,773.22, which was disallowed and rejected by the Commissioner of Internal Revenue on August 15, 1949 (Complaint, para. XVI, R. 9; Answer, para. XVI R. 18; Finding of Fact X, R. 23, 24).

This action was thereupon commenced to recover the tax paid under the deficiency assessment, together with interest from May 8, 1946, the date on which the tax was paid. 26 U.S.C.A. Sec. 3772. The elements of accounting which make up petitioner's loss and the amount of its claim for tax refund is immaterial in view of the stipulation between all of the parties that if petitioner is allowed by law to deduct its claimed abandonment loss in the year 1942, then petitioner is entitled to recover the full amount prayed for in its complaint (Finding of Fact X, R. 23, 24).

The case was tried before The Honorable William Healy, Circuit Judge, sitting for District Judge, who held the case was controlled by Coalinga-Mohawk Company v. Commissioner, 64 F. 2d, 262, (C. A. 9). Judge Healy seriously questioned the holding in this case which is, in effect, that abandonment loss cannot be taken for income tax purposes under 26 U.S.C.A. 23 (f) so long as ownership of the property is retained, but nevertheless entered judgment for respondents (R. 20, 26).

The Court of Appeals, by a divided court, Judge Pope dissenting, affirmed the Judgment of the District Court, holding that on the above stated facts, there was no affirmative act by petitioner indicating an abandonment of its mine, nor was there any intent of petitioner to abandon it, and therefore petitioner sustained no loss for income tax purposes in the year 1942 (R. 111).

REASONS FOR GRANTING THE WRIT

On the above admitted facts petitioner claims a deduction of its loss resulting from its abandonment of its mine in the year 1942, as provided by Title 26 U.S.C.A. Sec. 23 (f) and the corresponding Income Tax Regulations 111, Sec. 29.23 (e)-3, which regulation has been in effect in its present form for so long that it has the force and effect of law. Boehm v. Commissioner, 326 U.S. 287, 90 L. Ed. 79.

With the single exception of abandonment the existence of the other criteria set forth in the Income Tax Regulations for the deduction of this loss, such as change in business conditions, are not questioned by the Court of Appeals in this case. It is difficult to conceive what more could have been done by petitioner in order to effectively abandon this mine from use in its business, and still retain the ownership of its interests in the property, and this is all that is required by the statute and the regulations. As Judge Pope stated in his dissenting opinion.

> "When the provisions of that regulation are applied to the facts admitted and found here, it fits like a glove."

Petitioner submits that the Court of Appeals has confused the term "abandonment" as used in real property law with the requirements actually set forth in the Income Tax Regulations which are that the taxpayer "discards such assets permanently *from use in such business.*" Thus it is clear that a taxpayer need not so abandon property that he relinquishes all possession, ownership and control over it; it is sufficient that he discards it from use in his business. This concept is further borne out by the provision of the regulation, which recognizes that the taxpayer may retain ownership of the property for its salvage value. Again Judge Pope states as follows:

> "It seems to me that the majority opinion overlooks the fact that we deal here with a question of loss by abandonment as that term is used under the income tax regulations, not with the subject of forfeiture or abandonment of mining claims which is something quite different."

This rule is succinctly stated in Langdon Warren Mines v. Reynolds, 52 F. Supp. 512:

> "It is not necessary that there be an abandonment within the meaning of the real property law, or that legal title must be lost."

Of course, the petitioner desired to retain its ownership of the property so that it could subsequently realize the salvage value, if possible, and which it finally did by a sale for recreational purposes. For this purpose it paid the real estate taxes in the years 1943 and 1944 on the patented mining claims. Likewise, in the same years and for the same purpose it filed notices of intention to hold the unpatented mining claims as required by Title 30 U.S.C.A. Sec. 28 (a), which was a temporary provision eliminating the necessity of doing the annual assessment as required by Title 30, U.S.C.A. Sec. 28.

Under Title 30 U.S.C.A. Sec. 26, the owner of a mining location has the exclusive right of possession and enjoyment of all the surface of the ground. This is a property right in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited. Such exclusive right of possession forbids any trespass and gives to the owner the exclusive right of possession and enjoyment.

Wilbur v. Krushnic, 280 U.S. 306, 74 L. Ed. 445.

Clipper Mining Co. v. Eli Mining and Land Co., 194 U.S. 220, 48 L. Ed. 944.

It should be noted that even if petitioner had not filed its notices of intention to hold, nor done the annual assessment work, all its rights in the property would nevertheless have been preserved, subject to a new location by a third person. Even the United States could

not have forfeited any of the petitioner's rights therein. Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, 79 L. Ed. 1627. See also 30 U.S.C.A. Sec. 28. It would seem to follow from the reasoning of the Court of Appeals that had petitioner failed to file its notices of intention to hold its rights in the property, and had subsequently sold the property its loss resulting from the discard of the mine from use in its business in 1942 would have been allowed.

It is possible, as intimated by Judge Pope in his dissent that the notices of intention to hold which were filed by petitioner were ineffective to preserve its interest in the unpatented mining claims as against a new location. If this be true and new locators had filed on the property the only result would have been that such new locations would have at that time divested petitioner of its legal interests in the property; it would have had no effect whatsoever on the discard of its mine from use of its business in 1942. This view is clearly stated by Judge Pope in his dissenting opinion as follows:

> "But which ever way it be, whether the taxpayer properly and validly retained its surface rights to these claims, or whether it retained only a forfeitable interest therein, the consequence, tax wise, is the same. An abortive attempt to hold the surface alone would not tend in any manner to prove that the taxpayer had not abandoned the caved in workings."

In its brief in the court below, petitioner cited the case of Colorado and Utah Coal Company v. Commissioner, 26 B.T.A. 588, wherein the court permitted a mining company to deduct a loss resulting from the abandonment of a seam of coal where it continued to retain ownership of the property and mine another seam of coal on the same property. The majority opinion in the Court of Appeals distinguished this case from the one at bar on the grounds that had petitioner only partially abandoned the property and continued to mine other parts of it the loss would be allowed. Thus it is now the rule in the Ninth Circuit that if a taxpayer partially discards property from use in its business it has a taxable deduction, but if it wholly discards the property from use in its business such deduction is not allowable.

On the admitted facts in this case it is most difficult to see how it could be held that petitioner did not discard this mine from use in its mining business; but the Court of Appeals has held that the loss is not deductible because it continued to retain its ownership of the property in an attempt to recover its salvage value which it set up on its books in 1942. There will in the future be many taxpayers in the Ninth Circuit entitled to the deduction of losses from abandonment of property as permitted by 26 U.S.C.A. Sec. 23 (f) and Income Tax Regulations 29.23 (e)-3. But this right has now been denied by the Court of Appeals of that Circuit. It has rewritten this statute and regulation so as to prohibit the deduction where the taxpayer retains ownership of the abandoned property. Petitioner submits that this

decision is in direct conflict with the statute and regulation and is an important question of federal law which has not been, but should be, settled by this court.

A study of the opinion of the Court of Appeals readily reveals that the basis for its decision was that petitioner could not deduct the loss where it retained or attempted to retain the ownership of the property. It is stated therein as follows:

> "It will not do for appellant to say that in 1942 it legally abandoned the sub-surface mine and minerals, and in the same breath assert (as it did) a lawful right to retention of every form of property interest that appellant possessed in these claims at the beginning of 1942, and which interest it had previously possessed in the land and in the subsurface minerals."

Again the majority opinion stated that it was following the rationale of the Ninth Circuit cases cited in the reported opinion of the trial court. Only one opinion was cited in the trial court's opinion, and that was Coalinga-Mohawk Company v. Commissioner, 64 F. 2d 262, wherein a similar deduction for loss was denied, the court saying:

> "In any event, it is well settled that a loss is sustained within the meaning of the statute in question only when the transaction in respect of which the loss is claimed is closed and completed by some identifiable event which makes the loss de-

ductible, which ever occurs generally only when the property in question is sold or otherwise disposed of."

Such a statement by a Court of Appeals is rather remarkable in view of the statement in the regulations, Sec. 29.23 (e)-3 that "This exception to the rule requiring a sale or other disposition of property in order to exhibit a loss ***" is the purpose of 26 U.S.C.A. Sec. 23 (f).

As pointed out by Judge Pope in his dissent, the facts of the Coalinga case are clearly distinguishable from the case at bar. However, its rationale that all title and interest in property must be abandoned before the loss is deductible is in direct conflict with the decisions of Courts of Appeals in other circuits. Judge Healy, Circuit Judge sitting as the trial judge in this case, himself indicated that the Coalinga case was contrary to the general law. (R. 20).

In the Fourth Circuit it was held in United States v. Hardy, 74 F. 2d 841, (C.A. 4) that a taxpayer could keep the ownership of a near beer sales agency and charge off the loss even though he subsequently sold it for the same purpose. The same result was reached in that circuit as applied to an oil burning system in Wheeling Title Co. v. Commissioner, 25 F. 2d 455, (C.A. 4).

The Court of Appeals of the Third Circuit has followed the general rule and applied it to a manufactur-

ing plant in Sanitary Co. of America v. Commissioner, 34 F. 2d, 439, (C.A. 3). Again the Court of Appeals was consistent in its construction of the statute and regulations in refusing to allow a deduction and discontinuance of a railroad line where it appeared that actual abandonment had occurred in a prior year, in Mine Hill and Schuylkill Haven R. Company v. Smith 184 F. 2d 422, (C.A. 3).

The same rule was approved in the Sixth Circuit in Denman v. Brumback, 58 F. 2d 128, (C.A. 6), in which it was applied to the real property, and was again applied to real estate in Rhodes v. Commissioner, 100 F. 2d 966, (C.A. 6).

The Court of Appeals in the Eighth Circuit followed the general rule in Dayton Company v. Commissioner, 90 F. 2d 767, (C.A. 8), and applied it to real estate.

See also White Dental Manufacturing Company v. United States, 55 F. Supp. 117 (Ct. Cl.) and Langdon Warren Mines v. Reynolds, 52 F. Supp 512. It is not denied in this case that a most substantial loss was in fact incurred by petitioner and the only possible question is when the loss occurred. Obviously it did not occur prior to 1942 as petitioner had not intended to discard the mine from use in its business in any prior year nor had it performed any act of abandonment. It is noteworthy that the Court of Appeals does not indicate that petitioner suffered the loss in any year subsequent to 1942, even the year when it was sold for salvage. All the acts of discarding the property occurred

in 1942. In that year petitioner set up its salvage value of $30,000 on its books. Petitioner had no right to elect in which year it would take the loss. Dayton Company v. Commissioner, supra; Mine Hill and Schuylkill Haven R. Company v. Smith, supra.

The Court stated in Rhodes v. Commissioner, supra:

> "In arriving at losses the taxpayer should determine in the first instance the tax year in which sustained and such deductions should be allowed by the Commissioner of Internal Revenue unless it appears from the facts that the taxpayer was clearly unreasonable and unfair at the time he was compelled to make his decision."

In the case at bar petitioner intended to discard this mine from use in its business in 1942. In that year it did everything possible to discard it, but still retain its ownership for salvage purposes. It elected to claim its loss in that year, based on those facts. The Court of Appeals in the face of decisions in the Third, Fourth, Sixth and Eighth Circuits has disallowed the loss because of petitioner's retention of ownership. As Judge Pope said, "I think that the majority have given a wrong answer." This difference in the construction of the income tax statute and its complimentary regulations is of great importance and should be resolved by this Court for the guidance of taxpayers and the Internal Revenue Department alike.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	4
Conclusion	11
Appendix	12

CITATIONS

Cases:

Dayton Co. v. *Commissioner*, 90 F. 2d 767	9
Denman v. *Brumback*, 58 F. 2d 128	10
Harriss v. *Commissioner*, 143 F. 2d 279	5
Langdon-Warren Mines v. *Reynolds*, 52 F. Supp. 512	10
Louisiana Land & Exp. Co. v. *Commissioner*, 161 F. 2d 842	6
Mine Hill & Schuylkill Haven R. Co. v. *Smith*, 184 F. 2d 422, certiorari denied, 340 U. S. 932	10
Rhodes v. *Commissioner*, 100 F. 2d 966	10
Rialto Mining Corp. v. *Commissioner*, 1946 P-H T.C. decisions, par. 46,148	6
Sanitary Co. of America v. *Commissioner*, 34 F. 2d 439	9
United States v. *Hardy*, 74 F. 2d 841	10
United States v. *White Dental Co.*, 274 U. S. 398	10
Wheeling Tile Co. v. *Commissioner*, 25 F.2d 455	9
White, S. S., Dental Mfg. Co. v. *United States*, 55 F. Supp. 117	10

Statute:

Internal Revenue Code of 1939, Sec. 23 (26 U.S.C. 1952 ed., Sec. 23)	5, 12

Miscellaneous:

Treasury Regulations 111:

	Page
Sec. 29.23(e)-1	5, 12
Sec. 29.23(e)-3	5, 10, 13
Sec. 29.23(f)-1	14

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 90

TALACHE MINES, INCORPORATED, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, JOHN R. VILEY, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF IDAHO, AND CALVIN E. WRIGHT, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF IDAHO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion, findings of fact and conclusions of law of the District Court (R. 19-25) are reported at 108 F. Supp. 25. The opinion of the Court of Appeals (R. 100-111), together with a dissenting opinion (R. 111-118), is reported at 218 F. 2d 491.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1954 (R. 119), and a petition for rehearing was denied March 4, 1955 (R. 120). The petition for a writ of certiorari was filed May 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether the court below erred in upholding the District Court's conclusion that taxpayer did not abandon the Talache Mine in 1942 and therefore is not entitled to a loss deduction on that property for 1942 under Section 23 (f) of the Internal Revenue Code of 1939 and the pertinent Treasury Regulations.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are Section 23(f) of the Internal Revenue Code of 1939 and Sections 29.23(e)-1, 29.23(e)-3 and 29.23(f)-1 of Treasury Regulations 111. These are set forth in the Appendix, *infra,* pp. 12-15.

STATEMENT

This is a suit for refund of income taxes paid for the year 1942, based on the ground that the Commissioner of Internal Revenue erroneously disallowed a loss deduction claimed by taxpayer in the amount of the difference between taxpayer's adjusted cost basis for the Talache Mine and the salvage value of the property in 1942 (R. 3-10). The District Court denied the claimed loss deduction (R. 19-20, 24-25) and entered judgment for defendants (R. 26), finding that taxpayer did not abandon the property in 1942 and thus did not

realize a loss on the property in that year. The Court of Appeals affirmed, with one judge dissenting (R. 100-118).

The facts found by the District Court (R. 21-24) may be summarized as follows:

In 1917 and 1918 taxpayer purchased mining property, known as the Talache Mine, in Bonner County, Idaho. The property contained lead, gold, silver, copper and other precious metals. Taxpayer placed the mine in production in 1922 and operated it until 1926. Thereafter the property was leased, the final lease terminating late in 1941. During that time the mine workings were maintained and kept in repair by taxpayer and the various lessees. (R. 21.)

In 1942, when there were still approximately 83,463 tons of ore reserves in place, extensive and costly repairs to the mine workings were required if the mine was to be maintained and kept in condition for mining purposes. Taxpayer had made heavy financial commitments in relation to other mining properties which were seriously taxing its financial resources and was unable to sell or lease the Talache Mine in 1942. The mine could not be operated profitably at that time. The United States was then engaged in World War II; prices of material and labor costs were rising; there was a shortage of labor; and silver mines had no priorities, either as to material or as to labor. (R. 21-22.)

In the fall of 1942 taxpayer removed from the mine the steel rails, air hose, hoist, mine locomotive and cars, mine cage, compressor and all other use-

able equipment. All care and maintenance of the mine ceased and the mine was allowed to cave in. The mine has never since been used as mining property, nor has any ore been extracted therefrom. In the fall of 1942 taxpayer set up on its books the sum of $30,000 as the salvage value of the surface rights of the mining property for recreational purposes. (R. 22.)

During each of the years 1942, 1943 and 1944 taxpayer filed with the county recorder of Bonner County, Idaho, a declaration of taxpayer's intention to hold possession of its unpatented Talache mining claims in lieu of assessment work for each of these years. Taxpayer also paid all taxes assessed by the county against its patented Talache mining claims for these same years. (R. 22-23.)

At no time during 1942 did taxpayer give any notice to the public of abandonment of the property. Nor did taxpayer renounce its title or interest in any of the unpatented mining claims nor do any affirmative act showing an abandonment of the claims. Instead, taxpayer retained title and exercised its claim and control over the property until it was sold in 1947 for recreational purposes for $30,000. The sale covered taxpayer's mining claims, both patented and unpatented, and taxpayer's interest in buildings situated on the property. (R. 23.)

ARGUMENT

Contrary to taxpayer's argument (Pet. 11-19), the decision below is correct and involves no con-

flict of decisions or important question requiring settlement by this Court. Moreover, the case involves what is essentially a factual question.

1. Taxpayer is claiming a deduction under Section 23(f) of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 12) for a loss allegedly sustained in the taxable year 1942 in the amount of the difference between its adjusted cost basis for the Talache Mine and the 1942 salvage value of the property (R. 7-10). To sustain the claim in the absence of a sale or other disposition of the property in 1942, taxpayer was required to show abandonment of the property in 1942. See Treasury Regulations 111, Sections 29.23(e)-1 and 29.23(e)-3 (Appendix, *infra,* pp. 12-14); *Harriss* v. *Commissioner,* 143 F.2d 279, 282 (C.A. 2d). It made no such showing.

The evidence indisputably reflects that taxpayer did not abandon the property as such in 1942 and taxpayer makes no contention to the contrary. Its argument in the court below was that it abandoned the mine beneath the surface, although it retained the surface for sale for recreational uses; in other words, that it abandoned the property for one purpose and retained it for another purpose (see R. 104, 110). The court below rejected that contention on the ground that, by filing the declarations of intention to hold the unpatented claims on which all the mining had been done and by paying taxes on the patented claims for the years 1942 to 1945, taxpayer took affirmative action to retain every form of property interest it had previously pos-

sessed, not only in the surface but also in the subsurface minerals (R. 107-111). As the court below stated, instead of taking affirmative action of abandonment, taxpayer "evinced a bald and undisguised *intent to hold* and it annually performed an *affirmative act indicating a retention*" (R. 111) which "*in legal contemplation necessarily related to the claims as mineral ground*" (R. 110) (emphasis in original). Thus, taxpayer did not in fact abandon the subsurface.[1]

Even if taxpayer had in fact abandoned the subsurface as distinguished from the entire property, the claimed loss deduction would not be allowable. For the computation of losses, property is a single unit and not a bundle of separate interests or uses. *Louisiana Land & Exp. Co.* v. *Commissioner,* 161 F.2d 842 (C.A. 5th); see also, *Rialto Mining Corp.* v. *Commissioner,* decided June 25, 1946 (1946 P-H T.C. Memorandum Decisions, par. 46,148).

Now, in reliance upon the dissenting judge's interpretation of Section 29.23(e)-3 of Treasury Regulations 111, taxpayer views the case as involving only the question whether it abandoned the *use* of the mine in its business in 1942 (Pet. 19), as distinguished from abandoning the mine itself.[2] But if the regulation was intended to

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[1] Taxpayer could not at the same time both abandon and retain the subsurface. Moreover, the District Court did *not* find that taxpayer's intention was to retain the property only for salvage value through recreational uses.

[2] In the court below taxpayer relied upon this section of the Regulations but stated that the sole issue was whether it had abandoned its "mining properties" at Talache, Idaho (R. 104).

cover mines at all, mines would seem to be in the same classification as buildings, to which the regulation is specifically stated to apply only if the *buildings* are permanently abandoned or permanently devoted to a radically different use. The majority's conclusion that taxpayer did not abandon the Talache Mine in 1942, a conclusion not questioned by the dissenting judge, therefore seems sufficient to preclude application of the regulation.

The regulation is also inapplicable for other reasons. Even assuming the correctness of taxpayer's present interpretation of the regulation in respect of the requirement of abandonment, the regulation provides for a loss deduction only when (1) there is an abandonment of use of the property in the taxpayer's business, (2) the abandonment is caused by a sudden and premature termination of the usefulness of the property in the business, and (3) the sudden termination of usefulness results from some unforeseen cause. None of those elements is present here. The dissenting judge's contrary conclusion (R. 112-113) simply ignores the undisputed evidence.

Taxpayer did not abandon the use of the mine in its business in 1942 within the meaning of the regulation. It was engaged in the business of mining, as the whole record demonstrates. It placed the Talache Mine in production in 1922 but operated it only until 1926 (R. 21). The undisputed evidence is that the mine was shut down in 1926 because it was operating at a loss, that taxpayer

transferred the equipment and its mining operations to another mine in 1927 and later to still a third, more profitable mine (R. 52-53, 60-61). There is nothing in the record to indicate that taxpayer ever intended to transfer its mining operations back to the Talache Mine. After 1926 it simply maintained a caretaker at the mine and leased it to various parties who attempted to recondition it but never put it on a paying basis (R. 54-60). Thus, there was no use of the mine in taxpayer's business for taxpayer to abandon in 1942.

Nor was the useful value of the mine suddenly and prematurely terminated in 1942 for an unforeseen cause. The war, the only unforeseen event which could cause a sudden termination of useful value, had economic effects on the mining industry generally and taxpayer was unable to sell or lease the mine in 1942 (R. 22). It is also true that the mine could not be operated profitably in 1942 (R. 22) but, contrary to the dissenting judge's assumption (R. 112-113), the inability to operate profitably or to sell or lease in 1942 cannot be properly attributed to the war. For the 15 years prior to 1942, during the period 1926 to 1942, the leasing had been sporadic and none of the various lessees had operated the mine profitably (R. 54-60). Taxpayer's own evidence is that over the years the timber in the tunnels had deteriorated so that by 1942 the "life of the timber had expired" (R. 63) and in 1942 the mine would cave in unless costly and extensive repairs were made (R. 62-63). Taxpayer explained its decision not to make those re-

pairs on the grounds that it was already heavily obligated financially and that it was "unlikely" that anyone would want to operate the property "[w]ith the outlook at Talache as it was, requiring a large amount to maintain that property and with the looks of the war as it was" (R. 63-64). If the useful value of the mine terminated in 1942, it was due primarily, if not solely, to a gradual deterioration of the supporting tunnel timber prior to 1942 and taxpayer's decision not to make necessary costly repairs to put in condition for mining a mine which had not been operated profitably for the past 15 years.

2. In asserting that the decision below is in conflict with other decisions (Pet. 17-19), taxpayer apparently regards the case as involving nothing more than the question of whether all title and interest in property must be abandoned before a loss is deductible (see Pet. 17). We concede that the transfer of legal title to another is not a prerequisite to a finding of abandonment. However, it is quite another matter for a taxpayer to contend, as this taxpayer does, that it abandoned property despite having taken specific affirmative action to retain every interest it previously had in the property. The cases cited by taxpayer are all factually distinguishable.[3]

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[3] Three of the cited decisions, *Dayton Co.* v. *Commissioner*, 90 F. 2d 767 (C.A. 8th), *Sanitary Co. of America* v. *Commissioner*, 34 F. 2d 439 (C.A. 3d), *and Wheeling Tile Co.* v. *Commissioner*, 25 F. 2d 455 (C.A. 4th), did not even involve the abandonment of property. So far as pertinent here, they simply stand for the propositions that a loss may be fixed by

Of the four cited cases involving the abandonment of the property itself, three are distinguishable not only on the evidence but by virtue of their assumption that the property must be abandoned *as worthless.* See *Rhodes* v. *Commissioner,* 100 F. 2d 966 (C.A. 6th); *Denman* v. *Brumback,* 58 F.2d 128 (C.A. 6th); *Langdon-Warren Mines* v. *Reynolds,* 52 F. Supp. 512 (D. Minn.). In the other case, *Mine Hill & Schuylkill Haven R. Co.* v. *Smith,* 184 F.2d 422 (C.A. 3d), certiorari denied, 340 U.S. 932, there was no dispute as to the fact of abandonment of certain railroad lines; the question was whether the taxpayer had met his burden of proving that the abandonment had taken place in a particular taxable year.

Two of the cited decisions involved the regulation, now contained in Section 29.23(e)-3 of Treasury Regulations 111, relating to the loss of useful value in the business. In *United States* v. *Hardy,* 74 F.2d 841 (C.A. 4th), a deduction was allowed for a loss, caused by a proclamation prohibiting the manufacture of near beer after December 1, 1918, of the useful value of a contract giving the taxpayer the exclusive agency for sale of certain near beer. In the *S. S. White Dental Mfg. Co.* v. *United States,* 55 F. Supp. 117 (C. Cls.), in which two judges dissented, there was no question but

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an identifiable event other than a sale and without establishing the impossibility of eventual recoupment—propositions which this Court recognized in *United States* v. *White Dental Co.,* 274 U. S. 398, and which the court below did not controvert.

that the taxpayer had abandoned the use of one of its plants in its business and it was held that the cause of the abandonment was sufficient under the regulation. That those cases are distinguishable from the present case is apparent from our discussion of the requirements of the regulation as applied to the facts of this case, *supra*, pp. 7-9.

3. Taxpayer's assertion that the case involves an important question which should be resolved by this Court (Pet. 19) is based upon an assumption that there is a square conflict between the circuits as to the proper construction of the pertinent statute and complementary regulations. That assumption is erroneous. Moreover, the facts here are peculiar to the case and therefore not of a recurring nature.

CONCLUSION

The decision below is correct and involves no conflict of decisions or question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

[26 U.S.C. 1952 ed., Sec. 23.]

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(e)-1. *Losses by Individuals.*—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft, and a deduction therefor has not prior to the filing of the return been claimed for estate tax purposes in the estate tax return, * * *.

In general losses for which an amount may be deducted from gross income must be evi-

denced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113 (b). For special provisions with respect to war losses, see section 127.

* * * * *

SEC. 29.23(e)-3 [As amended by T. D. 5458, 1945 Cum. Bull. 45]. *Loss of Useful Value.*—When, through some change in business conditions, the usefulness in the business of some or all of the assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 113(b) and sections 29.113(a)(14)-1 and 29.113(b)(1)-1 to 29.113(b)(3)-2, inclusive) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in

the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income. The limitations provided in section 117 with respect to the sale or exchange of capital assets have no application to losses due to the discarding of capital assets.

* * * * *

SEC. 29.23(f)-1. *Losses by Corporations.*— Losses sustained by domestic corporations during the taxable year and not compensated for by insurance or otherwise are deductible in so far as not prohibited or limited by sections 23(g), 23(h), 24(b), 112, 117, 118, and 251. The provisions of sections 29.23(e)-1 to 29.23(e)-5, inclusive, and section 29.23(i)-1 are in general applicable to corporations as

well as individuals. See section 232 as to deductions by foreign corporations. For special provisions with respect to war losses, see section 127.

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